

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF ACCOUNTANCY

In the Matter of the
Certified Public Accountant
License and Certificate of
AND
Cyril Paul Fitzgerald.
ACTION

REC " ENDED ORDER
GRANTING MOT
SUMMARY JUDGMENT

FOR DISCIPLINARY

On August 31, 1990 a Notice of and Order for Hearing, Order to Show Cause and Statement of Charges was filed with the Office of Administrative Hearings by the Minnesota Board of Accountancy (Board). Simultaneously, the Board's counsel, Louis Hoffman, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, filed a Motion for Summary Judgment in behalf of the Board's Complaint Committee. On September 12, 1990, the Administrative Law Judge directed the Complaint Committee to supplement the motion papers and argument initially filed. In the letter requiring supplementation, the Licensee, Cyril Paul Fitzgerald, was notified that he would have ten (10) additional working days to respond to the supplemental filings made by the Complaint Committee. The supplementation requested of the Complaint Committee was filed on September 24, 1990.

The Licensee did not respond to the Complaint Committee's Motion prior to the expiration of the 10-day period set in the Administrative Law Judge's letter of September 12, 1990. Because the Licensee had moved, the Administrative Law Judge decided, on his own motion, to give the Licensee additional time to respond. By letter dated October 17, 1990 the Administrative Law Judge informed the Licensee that he would have until October 31, 1990 to respond to the Motion. The Licensee was also advised that if he failed to respond to the Motion or request an opportunity for oral or written argument that the Motion would be granted, the hearing would be cancelled, and this matter would be referred to the Board with a recommendation for disciplinary action.,

On November 1, 1990 the Administrative Law Judge received a letter from the Licensee advising that Licensee had not received the supplemental

documentation and argument the Complaint Committee was asked to file on September 12, 1990. Consequently, on November 2, the Complaint Committee

was ordered to serve its supplemental documentation and argument on the Licensee at his new address and the Licensee was ordered to respond to the pending Motion and file his written argument on or before November 26, 1990. On November 6, 1990 the Complaint Committee served copies of its supplemental documentation and argument on the Licensee. The Licensee has not responded to the pending Motion or filed written argument as ordered and is in default herein.

NOW, THEREFORE, based upon all the files, records and proceedings herein and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY RECOMMENDED:

- (1) That the Complaint Committee's Motion for Summary Judgment be GRANTED.
- (2) That the Board take disciplinary action against the certified public accountant license and certificate of Cyril Paul Fitzgerald.
- (3) That the Board set the earliest date when the Licensee may apply for reinstatement.

IT IS HEREBY ORDERED: That this Recommendation be certified to the Board for its consideration and that the hearing in this matter be cancelled.

Dated this d day of November, 1990.

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JON'L. LUNDE
Administrative Law Judge

MEMORANDUM

Factual Background

The moving papers filed by the Board's Complaint Committee establish the following facts:

- (1) The Licensee, Cyril Paul Fitzgerald, has been licensed by the Board as a certified public accountant since 1975 and holds certified public accountant certificate number 3266. Affidavit of Kathy Briesemeister.
- (2) On September 20, 1989 the United States of America filed a 15-count Indictment in the United States District Court for the District of Minnesota charging the Licensee with a variety of criminal acts. The Licensee was generally charged with having "devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, promises the omissions of vital information, and the concealment of material facts" from a variety of victims in violation of Title XVIII, United States Code, section 1341. See Counts VLII and X.
- (3) On January 20, 1990 the Licensee executed a Plea Agreement and Sentencing Stipulation pursuant to which the Licensee would plead guilty to Counts VIII and X of the Indictment charging the Licensee with using the mails to execute a scheme and artifice to defraud the individual victims identified therein in violation of Title XVIII, United States Code, section 1341.
- (4) On May 14, 1990 a Judgment Including Sentence was entered by the United States District Court indicating that the Licensee pled guilty to Counts VIII and X of the Indictment and finding him guilty of mail fraud in violation of Title XVIII, United States Code, section 1341. In the Court's Judgment including Sentence the Licensee was sentenced to five (5) years imprisonment under Count VIII and 30 months imprisonment as to Count X, both sentences to run concurrently. In addition, the Court ordered the Licensee to make restitution in the amount of \$1,811-,196.52 to approximately 38 persons.

(5) The Licensee is currently serving the sentence imposed upon him at the Federal Prison Camp at Duluth, Minnesota.

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On August 31, 1990 the Board's Complaint Committee filed a motion for summary judgment on the grounds that the Licensee's convictions violated Minn. Rules pt. 1100-5600 (1989) and justify license suspension or revocation under Minn. Stat. 326-23 (1988). The Licensee has not responded to the motion within the time period set forth in the rules of this Office and orders of the Administrative Law Judge.

Under Minn. Rule pts. 1400.6600 and 1400.5500 K (1989) summary judgment may be granted to a party in a contested case if no material facts are in dispute. When ruling on motions for summary judgment under the contested case rules, the Rules of Civil Procedure for the District Court must normally be followed. On a motion for summary judgment the moving party has the burden to establish that there are no genuine issues of material fact in dispute and that the movant is entitled to judgment as a matter of law. If this m facie showing is made by the moving party, the burden shifts to the nonmoving party to show that there are genuine issues of material fact which must be considered at a hearing. All of the documentary and affidavit evidence submitted must be viewed in a light most favorable to the nonmoving party. Lundgren v. Eustermann, 370 N.H.2d 877 (Minn. 1985); Grandnorthern, Inc. v. West Mall Partnership, 359 N.W.2d 41 (Minn. Ct. App. 1984).

Rule 56, Minn. R. Civ. P. governs summary judgments. Rule 56.03 states, in part, as follows:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues to any material fact and that either party is entitled to a judgment as a matter of law. * * *

In order to obtain summary judgment, the moving carries the burden of proof to establish that no genuine issue of material fact exists. @, e.g., Thiele v. Stitch, 425 N.H.2d 580, 583 (Minn. 1988). When the movant also bears the burden of persuasion on the merits at trial, its burden on summary judgment is to present "credible evidence" that would entitle it to a directed verdict

if not controverted at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2557, 91 L. Ed.2d 265 (1986) (dissenting opinion laying out majority position); Thiele v. Stitch, *supra*, 425 N.W.2d at 583 n. 1. With these basic principles in mind it is necessary to turn to the language of the governing statutes and rules.

Minn. Stat. 326.23 governs the revocation and suspension of licenses issued by the Board. It states:

The state board of accountancy may revoke or suspend any certificate or license issued under sections 326-17 to 326-23, for bad moral character, dishonesty, conviction of crime, incompetency or unprofessional conduct.

Certificates or licenses issued under 326.17 to 326.23 shall be surrendered to the state board of accountancy on their revocation or suspension by the board.

The state board of accountancy may reinstate a revoked certificate or license upon a petition for reinstatement by the former holder thereof.

The statute was in effect at the time of the criminal activities the Licensee admittedly committed.

The "unprofessional conduct" for which a person's license may be suspended or revoked is detailed in the Board's rules. Part 1110.5600 states that acts discreditable to the profession constitute unprofessional conduct and may be grounds for the revocation or suspension of a certificate and license. Minn. Rule pts. 1100-7300, subp. 2 and 1100-5600. Both rules were in effect at all times material to this case.

Under Minn. Stat. 326.23, the Licensee's conviction for mail fraud violated Minn. Stat. 326-23 which specifically authorizes revocation or suspension for the conviction of a crime. Hence, on that ground, summary judgment is clearly appropriate. -

Generally speaking, a *judicata* or collateral estoppel effect will not be given to a guilty plea. *Glen Falls Group Insurance Corp. v. Hoium*, 200 N.N.2d 189 (Minn. 1972). The guilty plea is evidence by way of admission or statement against interest but it is not given a conclusive effect. *Hoium*, *supra*; *Kvanli v. Villag_e of Watson*, 139 N.W.2d 275, 279 (Minn. 1965); *Official Committee of Disputed Litigation Creditors v. McDonald Investments, Inc.*, 42 B.R. 981 (D.C.N.D. Tex. 1984). Hence, when a person disputes his guilt of a crime to which a guilty plea has been entered, the person may have the right to explain the guilty plea or offer additional evidence regarding the facts. It follows, therefore, that the Licensee's guilty plea may not conclusively establish bad moral character, dishonesty, or unprofessional conduct for purposes of Minn. Stat. 326-23 and Minn. Rule pt. 1100-5600. Nonetheless, summary disposition on those-grounds is appropriate in view of the Licensee's failure to raise an issue of fact with respect to his guilty plea and the Complaint Committee's motion. The Licensee was required to raise a fact issue in response to the Complaint Committee's showing in support of the motion. *Borom v. City of St. Paul*, 289 Minn. 371, 184 N.W.2d 595 (1971); *Ahlm v. Rooney*, 274 Minn. 259, 143 N.N.2d 65 (1966). Because the Licensee has not

raised a fact issue, summary judgment in favor of the Complaint Committee is appropriate regarding its charges that the Licensee's criminal conduct establishes bad moral character, dishonesty, and unprofessional conduct justifying disciplinary action. The Licensee has simply failed to raise any fact issue requiring a hearing.

Disciplinary Act on

The so-called criminal Offenders Rehabilitation Act, Minn. Stat. 364.03 prohibits disciplinary action against a licensee based solely or in part on a criminal conviction unless the crime is "directly" related to the licensed occupation. In determining if a conviction upon which disciplinary action is proposed directly relates to the licensed occupation, the licensing authority must consider the following factors:

(a) The nature and seriousness of the crime or crimes for which the individual was convicted;

(b) The relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;

(c) The relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

Minn. Stat. 364-03, sub. 2 (1988). The Licensee's crimes were serious. The victims of the crimes to which he pled guilty were defrauded of \$67,000.00 and the Licensee was ordered to make restitution to other individuals even though he was not convicted of criminal fraud with respect to them. Total restitution ordered exceeded \$1,800,000-00. Mail fraud is a serious crime for which disciplinary action is authorized. Moreover, the Licensee's crimes are manifestly related to the purpose of regulating public accounting. Minn. Stat.

326.165, subd. 1 (1988) which states as follows:

Subdivision 1. Purpose. It is the policy of this state to promote the dependability of information which is used for guidance and financial transactions or for accounting or assessing the status or performance of commercial or noncommercial enterprises, where the public, private or governmental. The public interest requires that persons engaged-in the practice of public accounting be qualified; that a public authority competent to prescribe and assess the qualifications of public accountants be established; that the expression of any form of assurance or of opinions of financial statements be reserved to persons who demonstrate their ability and fitness to observe and apply the standards of the accounting profession; and that the use of accounting titles likely to confuse the public be prohibited.

The importance of high standards of morality and integrity in financial dealings are extremely important in the public accounting field. In the commercial world it is imperative that financial documents be accurate and reliable. The fraud perpetrated by the Licensee evinces a lack of the moral fitness required of a public accountant and the crimes for which he was committed are closely related to the purposes for which public accountants are regulated. It is obvious, therefore, that the Licensee's criminal convictions are wholly incompatible with his continued licensure as a public accountant and disciplinary action is appropriate.

There is no claim that the Licensee has been rehabilitated and he has asserted no reasons why disciplinary action should not be taken against him. Sufficient evidence of rehabilitation under Minn. Stat. 364.03, subd. 3

cannot be established because 'the Licensee has not been released from federal prison. Also, the Licensee failed to respond to the Administrative Law Judge's order that he indicate his desire for a hearing on the disciplinary action, if any, that should be taken. Therefore, there is no need for a hearing to

consider a rehabilitation issue.

Duration of Suspension or Revocation

Under Minn. Stat. 326-23 the Board is authorized to reinstate a revoked certificate or license upon a petition for reinstatement by the former holder.

Also, under Minn. Stat. 364-05, the Board is required to notify the licensee, inter alia, of the earliest date when the licensee may apply for licensure. Consequently, in the Board's order, that date should be set considering the minimal criteria for establishing sufficient rehabilitation set forth in Minn.

Stat. 364-03, subd. 3(a)-(c).

J.L.L.